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UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

MITCHELL REISMAN ) PETITIONER )	CV	CASE NO. 09-0	CR-159(KAM) <b>4571</b>
VS.		MATSUMOTO, J.	
UNITED STATES OF AMERICA		10014	O10, J.
RESPONDENT	) )	AZRACK	, M.J.

# PETITION FOR RELIEF PURSUANT TO WRIT OF CORAM NOBIS UNDER 1651(a)

COMES NOW, Pro Se petitioner in the above-styled motion, respectfully seeking leave of this Honorable court to grant relief by dismissing Court imposed restitution of \$1,069,000.00 dollars.

A petition for a Writ of Error Coram Nobis is designed to bring the attention of the court too, and obtain relief from ,errors of fact existing in cases which without negligence on petitioner's part were not raised by reason of mistake of fact, where facts did not appear on the face record, and were such as, if known in season, would have prevented the judgment of restitution rendered.

U.S. vs. Lowe, 6 Fed. App. 832 (10th cir. 2001)

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AZRACK, M.J.

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The 12 month time limitation for filing a Section 2255 motion as promulgated by the AEDPA (Anti-Terrorism and Effective Death penalty Act) of 1996 precludes

Petitioner from seeking relief through the instrumentality of a Motion to vacate, set aside, or reduce Sentence. Due to mistake of fact, the issue of Petitioner's ability to pay the restitution imposed by the court was not raised. See United States Vs. Golden, 854 F.2d 31-33 (2<sup>nd</sup> Cir. 1988) (petitioner in custody alleging mistake of fact for failing to timely file rule 35 may be entitled to Coram Nobis relief under 1651 (a), even if he is barred from proceeding under 2255.

Petitioner also contends that failure by this court to adjudicate this issue would result in a miscarriage of justice. <u>United States Vs. Ko, 1999 WL</u> 1216, 730

S.D.N.Y. 1999) (unpub.) (exercising jurisdiction under 1651 (a) to reduce defendant's sentence so as to avoid effects of immigration law that otherwise cause miscarriage of justice). <u>United States V. Munez</u>, 1989 WL 59609, \*2 (S.D.N..Y. May 30,1989); accord <u>Mandarino vs. Ashcroft</u>, 290 F. Supp.2d 253 n.3 (D. Conn. 2002) (noting Court "would be inclined to grant the petition of Writ of Error Coram Nobis.........if the claim were denied procedurally barred for purposes of a 2255 petition").

### STATEMENT OF JURISDICTION

This Court has subject matter and personal jurisdiction over the issues and parties pursuant to Title 28 U.S.C. 1651 (a) (b) and title 18 U.SC. 3231.

The law is clear as to the trial court's jurisdiction over the issues, to act on otherwise final Judgment by Writ of Error. <u>United States vs. Morgan.</u> 1364 U.S. 507, 74 S.CT. 247 (1954). A Writ of Error is addressed to the sentencing court of jurisdiction. <u>United</u>

<u>States vs. Montreal</u>, 301 F.3d 1127, 1130 (9th Cir. 2002); <u>United States vs. Valdez</u>

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Pacheco, \_\_\_\_\_and Madigan vs. Wells, 224 F.2d 527, 578 n. 2 (9th Cir. 1955).,

In Obado vs. New Jersey, 328 F.3d 716 (3rd Cir. 2002) the Third Circuit Court of

Appeals Wrote "the unavailability of Habeas Corpus relief does not leave deserving

Petitioners entirely without recourse because they may bring claims via Writ of Error."

Id. At 718 (citing Sinclair vs. Louisiana, 679 F 2d 513. 514 (5th Cir. 1982). This

court is vested with the Judicial power to fashion the Petitioner's motion with a remedy,

where there is an invasion of a federally protected right. Bell vs. Hood 327 U.S. 684,

90 L.Ed 944, 19 ALR 383.

Petitioner asks this court to take judicial notice of matters of settled law. This petition is based upon the argument contained herein in this document, as well as all records and files to the instant case to include any and all evidence that may be submitted to this Honorable Court, whether by brief or evidentiary hearing.

Based on settled law, pleadings, exhibits, and evidence presented in the body of this application, "No alternative means by which he may seek relief exists." See <u>Kerr</u>, Supra, 426 U.S. 403 and ".....this pleading meets the burden of showing that petitioner's right to the writ is clear and undisputable." <u>United States Vs. Ovell</u>, 176 U.S. 576 19 S. Ct. 286 (1899).

### OVERCOMING PROCEDURIAL BAR ON APPELLANT'S CLAIMS

Statute of limitations 28 U.S.C. 2501 does not bar claims by reason of cause and prejudice that overcomes any procedural default by PETITIONER, cause for default, and actual prejudice resulting wherefrom. Murray vs. Carrier, 488 U.S. 478, 494-495 1986). Engel vs. Isaac, 456U.S. 107 (1982). See Wainwright vs. Sykes, 433 U.S. 72 (1977). Engel vs. Isaac put the final touches on this process requiring the cause and

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prejudice sometime for a case, involving a presental difficult which of constitutional normal and a see the contract of the contract 不可可能的自己的正式,是是自己的主要的意思,但可能是一种自己的主要的。但是一种的主要的一种,但是一种的主要的主要的一种,但是一种的主要的一种,但是一种的主要的一种,但是一种的主要的一种的主要的一种,但是一种的主要的一种的主要的一种的主要的一种。 The William to be a selected to the first of the selected of the selected by the selected by the selected of the selected by the selected of the selected by t THE SEX OF FOREST CONTROL WITH CONTROL OF CO Berger dog state in wear hand and the first of the control of the The Color of the All and an appropriate the color of the residence of a religious and appropriate residence of 。 Takk to P. C. P. at Production (Market posturity conductor) of one can off guide to a C. the Food Offer EAST tible oner et a colorino lichten norm ber mene ville et befolg bill diebet in eine et beschiebet. to 1856, a of assessin bulath afterdus autal as apict of a laboration named as solutions in augustic ile minimatarti man. Huffilonor, u ar told dant mi'r his kigl consissi e seid docide edidicionamente di la producti de la composita not injunctional deskirk placed in Direction (in the contraction of the property o destruir de la Normania de la completa de la comp - Indirection of the control of the รางเรื่อง 🧸 🐧 เดิมของ เขอเลล ให้เลือด เมื่อ เดิมเดิมตา เขาได้เลิม 🚜 และเดิมของกุมหญิง โดยการระบบ คุณ die der minden begreichtigt die der der gegen der gegen der der die der der der der der der gegen der der der rancia a Makawatufu anni kalendarah kanyari kanyari basutu basutu kalendari kalendari ka kamai 要加速的企业。1915年的,可能对于1917年中国中国人类的股份基础基础的基础的。1915年中国人。 or thinking a separated and the contraction of the space of the separated and represent and the second or the prove his immountee annight conderes of preparities in in effect possible has investigated in effect possible. shough the <u>Walter growing</u> Cope hands designed allogs Perklages talents his

magnitude or not. See Estelle vs. Williams, 425 U.S. 501 (1976); Francis vs.

Henderson, 425 U.S. 536 (1976), Davis vs. United States, 411 U.S. 233 (1973);

Wainwright vs. Sykes, 433 U.S. 72 (1977). See McLesky vs. Zant, 499 U.S. 495

(1992). Legal standard applied in Schlup vs. Delo, 513 U.S. 298, 115 S. Ct. 851, 130 £.Ed.2d 808 (1995).

Additionally, Petitioner's claims can be brought due to fundamental defect resulting in a complete miscarriage of justice. <a href="United States vs. Smith">United States vs. Smith</a>, 843 F.2d 1148. 1149 (8th Cir. 1988) (quoting Bonsley vs. United States, 573 U.S. 614, 622, 118 S.Ct. 1604, 140 .Ed.2d 828 (1988)). The cause and prejudice standard is a Supreme Court proscription to obtain a collateral review of a "procedurally defaulted issue by a 2255 movant. In this instant case Petitioner was told that only his trial counsel would decide who testifies and as a result no evidence was presented that showed the existence of the assets he hired the co-defendants to retrieve and that Petitioner clearly hired and paid for their services, <a href="here">he was not part of any conspiracy or even maintained any relationship of any kind other then a customer with an arms length transaction.</a>
Trial counsels goading and misrepresentations which worked to the petitioners actual and substantial disadvantage, infecting the entire proceedings with error of constitutional dimensions."

Johnson, 278 F.3d 844 (quoting United States v. Frady, 456 U.S. 152, 170, 102 s.Ct. 1584, 71 L.Ed 2d 816 (1981).

Having overcome the requirements of the gateway claim, Petitioner's attempt to prove his innocence outright renders any procedural bar irrelevant, in effect passing through the <u>Schlup</u> gateway. Going through this gateway allows Petitioner to have his

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otherwise barred constitutional claims considered on their merits.. Id. 315 (quoting Herrara vs. Collins, 506 U.S. 390, 404, 113 S.Ct. 853, 122. ed. 2d 203 (1993)).

Following this rationale, in order for Petitioner to prevail besides the constitutional errors, he will show that but for deficient counsel who neglected to allow any witnesses, it is more than likely that no reasonable juror would have found him guilty since all the Exculpatory evidence would have CLEARY shown him to be innocent. The petitioner never raised a dime for BIM as the prosecution lied and misstated. The court has refused to look at the contracts, documents & physical evidence provided that show the truth, only regurgitating false statements with NO CARE FOR THE TRUTH.

Appellant can overcome procedural default by presenting sufficient evidence to "demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice." Coleman, 501 U.S. 750, Petitioner will demonstrate that his case falls the "narrow class of cases....(involving) extraordinary instances when constitutional probably has caused the conviction of one innocent of the crime." McClesky vs. Zant, 499 U.S. 467, 494, 111 S.Ct. 1454, 113 L.Ed 2d 517 (1991).

## **STATEMENT OF ISSUES**

WHETHER BECAUSE PETITIONER LACKS THE RESOURCES TO PAY THE

COURT IMPOSED RESTITUTION, THE COURT MAY EXERCISE ITS

EQUITABE POWERS TO DISMISS IT IN THE INTEREST OF JUSTICE.

Standard of review

(All Writs Acts provides a basis for exercise of equitable power to separate from inherent authority). Texas Inc. Vs. Chandler, 354 F. 2<sup>nd</sup> 655,, 657 (10<sup>th</sup> Cir. 1965) Court

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has the "power and inescapable duty, whether under the all Writs Statute, 28 U.S.C. 1651, or under its inherent powers of appellate jurisdiction, to effectuate what seems to be (the Court) the manifest ends of justice) internal quote marks omitted).

Discussion:

Without downplaying the significance of the Petitioners offense, Petitioner's legal arguments, he seeks the indulgence and permission of this Honorable Court to invoke the memorable words of the court in <u>UNITED STATES VS. MORGAN</u>, 346 U.S. 502,505. (1954) ("In behalf of the unfortunates, federal courts should act in doing justice if the record makes a plain a right to relief") Restitution ordered reversed for a defendant with no ability to pay and no future prospects. <u>United States vs. Remillong</u>, 55 F.3<sup>rd</sup> 572 (11h)

Cir. 1995)

At the Federal Correctional Institution, where Petitioner was in custody he made an average of \$11 per month. Currently he is working and earning \$400 per week. It is impossible to get by on \$400 per week and pay for housing and restitution. With no resources or savings, any additional financial burden placed on him by this Honorable Court would run contrary to the intent of Congress, the courts, and the Department of Justice to rehabilitate and offer a smooth transition back into a free society. A restitution would impede petitioner, undermining these intentions.

In <u>United States vs. Blake</u>, 81 F. 3d 498 (4<sup>th</sup> Cir. 1996) the court held that "the court had to ae findings that the defendant can pay that amount without hardship." Further, in the <u>United States vs. Jaroszenko</u>, 92 F. 3d 486 (7<sup>th</sup> Cir. 1996) (the Court failed to fully consider the defendant's ability to pay restitution).

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The decisions of the following Courts are unanimous on the question of Defendant's ability to pay restitution: <u>United States vs Monem</u>, 104 F 3d 250 (5<sup>th</sup> Cir. 1997): <u>United States Vs. Siegel</u>, 153 F. 3d 1256 (11<sup>th</sup> Cir. 1998).

# **RELIEF SOUGHT**

WHEREFORE, Petitioner seeks leave of this Honorable Court to dismiss the amount of restitution in the interest of Justice.

Date: May 3, 2014

Respectfully submitted,

Mitchell Reisman #29932-050 PRO\_SE